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No. 91-1306

In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA, PETITIONER

v.

GUY W. OLANO, JR., AND RAYMOND M. GRAY

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether allowing alternate jurors to be present during jury deliberations is automatic reversible error, even when the defense consents to that procedure.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-32a) is reported at 934 F.2d 1425.

JURISDICTION

The judgment of the court of appeals was entered on May 31, 1991. A petition for rehearing was denied on October 18, 1991. Pet. App. 33a. On January 7, 1992, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including February 15, 1992. The petition was filed on February 11, 1992, and was granted on May 18, 1992. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

FEDERAL RULES INVOLVED

Federal Rule of Criminal Procedure 24(c) provides:

> **Alternate Jurors.** The court may direct that not more than 6 jurors in addition to the regular jury be called and impaneled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. * * * An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict.

Federal Rule of Criminal Procedure 51 provides:

> Exceptions to rulings or orders of the court are unnecessary and for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which that party desires the court to take or that party's objection to the action of the court and the grounds therefor; but if a party has no opportunity to object to a ruling or order, the absence of an objection does not thereafter prejudice that party.

Federal Rule of Criminal Procedure 52 provides:

> (a) **Harmless Error.** Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.
>
> (b) **Plain Error.** Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT

Following a three-month trial in the United States District Court for the Western District of Washington, a jury convicted respondents of conspiring to defraud the United States by defrauding several thrift institutions, in violation of 18 U.S.C. 371; willfully misapplying federally insured funds, in violation of 18 U.S.C. 657; making false statements in connection with a federally insured lending institution, in violation of 18 U.S.C. 1006; and transporting stolen money in interstate commerce, in violation of 18 U.S.C. 2314. Respondent Gray was also convicted of wire fraud, in violation of 18 U.S.C. 1343, and respondent Olano was also convicted of making a false statement on a loan document, in violation of 18 U.S.C. 1014. Respondents were each sentenced to 15 years' imprisonment, to be followed by five years' probation, and they were ordered to pay restitution. See Pet. App. 2a, 4a-5a.

1. The evidence at trial showed that Olano was the chairman of Alliance Federal Savings and Loan Association in Kenner, Louisiana. Gray was the chairman of Home Savings and Loan Association in Seattle, Washington. Along with several co-defendants, Gray and Olano engaged in an elaborate scheme to defraud the savings and loan institutions they controlled by making a series of unauthorized loans and fraudulent extensions of credit, and by paying kickbacks from loan proceeds. Pet. App. 3a-4a.

2. During pretrial proceedings, the parties agreed that 14 jurors would be chosen at the outset of trial, with two of the 14 to be designated as alternates at the close of the case. See J.A. 20-23; Feb. 5, 1987, Tr. 17-22. At that time, each side would select one juror to be an alternate. That procedure was fol-

lowed, and a total of 14 jurors were chosen. All 14 were treated alike throughout the trial.

At the end of trial, the district court suggested that the two alternate jurors be allowed to remain with the jury during deliberations. The court told the parties:

> [I]t's just a suggestion and you can—if there is even one person who doesn't like it we won't do it, but it is a suggestion that other courts have followed in long cases where jurors have sat through a lot of testimony, and that is to let the alternates go in but not participate, but just sit in on deliberations.
>
> It's strictly a matter of courtesy and I know many judges have done it with no objections from counsel. One of the other things it does is if they don't participate but they're there, if an emergency comes up and people decide they'd rather go with a new alternate rather than 11, which the rules provide, it keeps that option open. It also keeps people from feeling they've sat here for three months and then get just kind of kicked out. But it's certainly not worth—unless it's something you all agree to, it's not worth your spending time hassling about, you know what I mean? You've got too much else on your mind. I don't want it to be a big issue; it's just a suggestion. Think about it and let me know.

J.A. 79; Tr. 10,400.

Later that day, counsel for Gray expressed reservations about the court's proposal. The following colloquy occurred:

> THE COURT: [H]ave you given any more thought as to whether you want the alternates to go in and not participate, or do you want them out?

> MR. ROBISON [counsel for Gray]: We would ask they not.
>
> THE COURT: Not.

J.A. 82; Tr. 10,609. The next day, however, the court determined that the defendants did not object to permitting the alternates to retire with the jury. The court said:

> THE COURT: Well, counsel, I received your alternates. Do I understand that the defendants now—it's hard to keep up with you, Counsel. It's sort of a day by day—but that's all right. You do all agree that all fourteen deliberate?
>
> Okay. Do you want me to instruct the two alternates not to participate in deliberation?
>
> MR. KELLOGG [counsel for co-defendant Hilling]: That's what I was on my feet to say. It's my understanding that the conversation was the two alternates go back there instructed that they are not to take part in any fashion in the deliberations.

J.A. 86; Tr. 10,736.

After that discussion, the district court instructed the jury. At the end of the instructions, the court explained that two of the jurors would be designated as alternates. The alternates, the court explained, would be allowed to retire with the jury, but would not be permitted to participate in the deliberations. J.A. 89-90; Tr. 10,802-10,803. The court then told the jury for the first time which of the jurors were the alternates. *Ibid.* The jury retired to deliberate, accompanied by the two alternates. One of the alternates later asked to be excused, and the district court granted the request. The other remained with the jury until it reached a verdict. Pet. App. 7a n.7.

3. The court of appeals reversed. Pet. App. 1a-32a. The court noted that Fed. R. Crim. P. 24(c)

requires the district court to discharge the alternates when the jury retires to deliberate. The court therefore held that the district court's failure to discharge the alternates violated Rule 24(c). Pet. App. 30a.

The court acknowledged that neither respondent objected to the district court's decision to retain the alternate jurors after the jury retired to consider its verdict, Pet. App. 22a, and it assumed, *arguendo*, that counsel for co-defendant Hilling spoke for all the defendants when he specifically consented to the procedure, *id.* at 27a. The court further recognized that, because respondents did not object to sending the alternates into the jury room, the district court's action was reviewable only under the plain error standard. *Id.* at 22a-23a. Nonetheless, the court of appeals held that permitting alternates to be present during deliberations is plain error, because it "inherently" prejudices defendants by "infring[ing] upon the jury's privacy and the secrecy of the jury process." *Id.* at 28a. The court stated that it could not determine whether the alternates had obeyed the district court's instruction not to participate in the deliberations. Moreover, the court added, even if the alternates attempted to follow the court's instructions, their "attitude[s], conveyed by facial expressions, gestures or the like, may have had some effect upon the decision of one or more jurors." *Ibid.*

The court acknowledged that a defendant can waive his objection to a violation of Rule 24(c), but only if the defendant himself, rather than his counsel, personally consents on the record to the procedure. Because "[n]othing in the record suggests that the defendants intelligently and knowingly consented personally to a waiver of their rights under

the Rule," the court held that there was no waiver in this case. Pet. App. 27a-28a.

In sum, the court held that "[a]bsent a valid personal waiver by the defendants, allowing alternate jurors to be present during jury deliberations * * * requires reversal." Pet. App. 30a. Although respondent Olano was the only defendant who raised the issue on appeal, the court applied its ruling to respondent Gray as well to avoid a "manifest injustice." *Id.* at 30a-31a.[1]

SUMMARY OF ARGUMENT

The district court in this case violated Rule 24(c) of the Federal Rules of Criminal Procedure by permitting the alternate jurors to observe the jury's deliberations. Respondents failed, however, to object to the Rule 24(c) violation, and in fact the record indicates that their counsel consented to the procedure.

The court of appeals recognized that, because of respondents' failure to object, the Rule 24(c) violation was reviewable on appeal only for plain error. The plain error doctrine creates a narrow exception to the contemporaneous objection rule, one that is to be applied only when a miscarriage of justice would otherwise result. To satisfy that standard, a reviewing court must find that the claimed error not only seriously affected the defendants' rights, but also that it had an unfair prejudicial impact on the trial.

The error in this case did not remotely satisfy that standard. The court of appeals found plain

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[1] The court of appeals also held that there was insufficient evidence to support respondents' convictions under 18 U.S.C. 1006. Pet. App. 13a-17a, 18a-20a. That ruling is not before this Court.

error in this case by concluding that permitting alternate jurors to observe jury deliberations is "inherently prejudicial," and that it requires reversal in every case, regardless of whether any specific prejudice flowed from the error. That conclusion, however, reflects a serious misapplication of the plain error doctrine, and it confuses harmless error and plain error analysis. Even if the court of appeals were correct that the error in this case was "inherently prejudicial," that would demonstrate only that the error is among the few errors in trial procedure that are not subject to harmless error analysis under Fed. R. Crim. P. 52(a). But the harmless error and plain error doctrines serve different purposes, and the fact that a particular error can never be harmless within the meaning of Rule 52(a) does not mean that such an error is always "plain" within the meaning of Rule 52(b).

In any event, the court of appeals erred in concluding that the procedure followed in this case was inherently prejudicial. There is as much reason to suppose that the alternate jurors favored acquittal as conviction, and the increase in the number of jurors in the jury room probably favored the defense, since a larger number of jurors generally makes conviction less likely. Moreover, there was no constitutional infirmity in permitting the alternates to observe the jury deliberations; even if the alternates are regarded as extra jurors for that purpose, this Court has never suggested that the Constitution imposes a maximum limit of 12 on the size of a jury.

The court of appeals also erred in holding that the presence of the alternates in the jury room requires reversal because it resulted in an invasion of the privacy of the jury's deliberations. In virtually every respect, alternate jurors are indistinguishable from

regular jurors. They are subject to the same selection process as regular jurors, have the same qualifications, take the same oath, and, until the beginning of deliberations, perform exactly the same functions. It is therefore unrealistic to characterize the alternate jurors as strangers to the jury in the way that a true outsider to the process would be.

Finally, there is no basis for the court of appeals' conclusion that respondents' personal consent was necessary for an effective waiver of their right not to have alternate jurors present during deliberations. With respect to most rights of the defendant in the criminal justice process, the defendant's attorney is authorized to make decisions that result in the forfeiture of those rights without the need to obtain a record recital of the defendant's personal and informed consent. Although this Court has recognized exceptions to that rule, the exceptions all involve decisions that have sweeping consequences for the defendant, such as whether to be represented by counsel, whether to plead guilty, and whether to waive a jury.

The decision to permit alternate jurors to retire with the regular jurors during deliberations is not the sort of fundamental trial decision that the defendant must make personally. In concluding otherwise, the court of appeals noted that requiring personal consent from the defendant "alerts the defendant to the fact that a waiver of Rule 24(c)'s protections may affect the outcome of his case." Pet. App. 26a. We doubt the validity of that proposition, but in any event, the same thing could be said of countless other decisions at trial that are undoubtedly subject to waiver by counsel. Nothing about the decision at issue in this case made it improper for that decision to be made by counsel, as the defend-

ants' representatives, rather than by each defendant personally.

ARGUMENT

RESPONDENTS FORFEITED THEIR RULE 24(c) CLAIM BECAUSE THEY DID NOT OBJECT TO THE PRESENCE OF ALTERNATE JURORS IN THE JURY ROOM DURING DELIBERATIONS

We agree with the court of appeals and respondents that the district court violated Rule 24(c) of the Federal Rules of Criminal Procedure when it failed to discharge the alternate jurors at the time the jury of 12 retired to deliberate. Rule 24(c) provides that "[a]n alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict." The Rule does not authorize the district court to follow a different course if the parties agree; we therefore acknowledge that permitting the alternates to retire with the jury during deliberations was error.

The dispute in this case is over the consequences of that error. We submit that the court of appeals was wrong in concluding that the failure to discharge the alternate jurors was plain error that required reversal of all of respondents' convictions. In our view, the error in this case did not approach the level of plain error. By failing to interpose a contemporaneous objection, respondents accordingly forfeited their right to object to that error on appeal and seek relief based on that claim.

A. Respondents Failed To Object To Permitting The Alternate Jurors To Retire With The Jury

The court of appeals found that respondents' counsel did not object to the presence of the alternates in the jury room during deliberations, Pet. App. 22a,

and it assumed, *arguendo*, that counsel for a co-defendant spoke for all the defendants when he specifically consented to the procedure, Pet. App. 27a. The court was clearly correct in finding that respondents did not object to the procedure, and the conclusion that counsel for a co-defendant spoke for the other defendants, including respondents, when he affirmatively consented to the procedure is virtually compelled by the record.

When the district court first raised the idea of permitting the alternate jurors to "sit in on" jury deliberations, counsel for Gray stated, "We would ask that they not." J.A. 82; Tr. 10,609. The next day, however, the district court addressed counsel for all the defendants and said—apparently referring to an earlier, off-the-record conversation—"I understand that the defendants now * * *. You do all agree that all fourteen deliberate." No one disagreed with the court's characterization of the defendants' position on the matter. The court then asked, "Do you want me to instruct the two alternates not to participate in deliberations?" Pet. App. 6a. The only response was a statement by counsel for co-defendant Hilling that "It's my understanding that the conversation was the two alternates go back there instructed that they are not to take part in any fashion in the deliberations." J.A. 86; Tr. 10,736. Although the district court had earlier made it clear that the alternates would not be permitted to retire with the jury if there was any objection ("[I]f there is even one person who doesn't like it we won't do it." J.A. 79; Tr. 10,400), none of the defendants raised an objection at that time. Pet. App. 6a-7a.

B. The Contemporaneous Objection Rule Bars Respondents From Obtaining Review Of Their Rule 24(c) Claim

By failing to object in a timely fashion, respondents forfeited any claim of error based on the composition of the jury during deliberations. As this Court has explained, "[n]o procedural principle is more familiar to [the] Court than that a * * * right may be forfeited in criminal as well as civil cases by the failure to make [a] timely assertion of the right before a tribunal having jurisdiction to determine it." *Yakus* v. *United States*, 321 U.S. 414, 444 (1944); accord *Peretz* v. *United States*, 111 S. Ct. 2661, 2669 (1991); *United States* v. *Frady*, 456 U.S. 152, 162-163 (1982); *United States* v. *Socony-Vacuum Oil Co., Inc.*, 310 U.S. 150, 238-239 (1940). Federal Rule of Criminal Procedure 51 embodies that principle, providing that an error is preserved for appeal only if the party "makes known to the court the action which that party desires the court to take or that party's objection to the action of the court." [2]

[2] Rule 51 sets forth a rule of forfeiture, not waiver, although the courts occasionally speak in terms of a defendant's "waiver" of a legal claim. See Paul T. Wangerin, *"Plain Error" and "Fundamental Fairness": Toward a Definition of Exceptions to the Rules of Procedural Default*, 29 DePaul L. Rev. 753, 757-758 (1980). The term "waiver" can be confusing in this context, because it sometimes is used to refer to the intelligent and knowing relinquishment of a right. See, *e.g.*, *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938). The forfeiture principle in Rule 51, however, does not depend on the defendant's state of mind when he failed to raise an issue in the trial court. See *United States* v. *Gagnon*, 470 U.S. 522, 527-528 (1985); *Wainwright* v. *Sykes*, 433 U.S. 72, 82-91 (1977); *Estelle* v. *Williams*, 425 U.S. 501, 508 & n.3 (1976). Rights may be forfeited for failure to object both advertently and inadvertently.

The contemporaneous objection rule promotes judicial economy by bringing the claim of error to the trial court's attention and providing the court an opportunity to resolve the matter as the defendant wishes. See *Wainwright* v. *Sykes*, 433 U.S. 72, 90 (1977); *United States* v. *Gagnon*, 470 U.S. 522, 529 (1985); *Luce* v. *United States*, 469 U.S. 38, 41-42 (1984); 3 Wayne R. LaFave & Jerold H. Israel, *Criminal Procedure* § 26.5, at 251 (1984). That was undoubtedly true in this case, in view of the trial court's explicit statement that it would not permit the alternates to retire with the jury if even one of the defendants objected. Pet. App. 5a n.5. If respondents, or any of the other defendants, had objected to the court's proposal, the court would not have allowed the alternates to retire with the jury, and the matter would never have become an issue on appeal.

The contemporaneous objection rule also requires the parties to declare the action they want the court to take. It thereby reduces the risk of manipulation by a defendant who pursues one course at trial for tactical reasons and later claims that the course followed by the court was reversible error. See 3 Wayne R. LaFave & Jerold H. Israel, *supra*, at 251; see also *Wainwright* v. *Sykes*, 433 U.S. at 89; *Luce* v. *United States*, 469 U.S. at 42; *Estelle* v. *Williams*, 425 U.S. 501, 508 (1976). That factor is also present in this case. The district court told all the defendants to think overnight about whether they objected to including the alternates in deliberations. The next day, the court determined on the record that the defendants did not object to the alternates' presence as long as the alternates were instructed not to participate in the deliberations. The court then gave that instruction and permitted the alternates to retire with the jury. No complaints or reservations

were heard from the defendants until they were convicted and the case was on appeal.[3] Under those circumstances, the court and the prosecutor should have been entitled to assume that respondents had abandoned any objection to allowing the alternates to accompany the jury during deliberations.

Courts are particularly reluctant to permit attorneys to request or agree to a particular procedure and then on appeal invoke the error as a basis for reversal. See *United States* v. *Angiulo*, 897 F.2d 1169, 1216 (1st Cir.), cert. denied, 111 S. Ct. 130 (1990) ("Having persuaded the court to adopt their proposal, rather than the government's, defendants should not be allowed to circumvent the judicial process by challenging on appeal the trial court's decision to adopt it."). To recognize such claims would provide an incentive to inject error into the proceedings in the hope of creating an issue that could be raised on appeal in the event of a conviction. See *Henry* v. *Mississippi*, 379 U.S. 443, 451 (1965). Moreover, when a defendant or his counsel agrees to or acquiesces in a particular course of action at trial, it is clear that the parties have adverted to the issue and that the failure to object is not the product of negligence or inattention on the part of counsel. See *Estelle* v. *Williams*, 425 U.S. at 510. For those reasons, defendants like respondents who agree to a particular procedure, even more than defendants who merely fail to object, should forfeit the right to claim on appeal that the district court erred in adopting that procedure.[4]

[3] Even then, only Olano, proceeding pro se, raised the issue, and he did so by arguing that permitting the alternates to retire with the jury violated his "right" to a jury of exactly 12 members—a "right" that this Court has held not to exist. See *Williams* v. *Florida*, 399 U.S. 78 (1970). The court of appeals found that argument sufficient to raise the Rule 24(c) violation, found that violation to be plain error, and extended that holding to respondent Gray—who was represented by counsel, but did not properly raise the argument even on appeal—because in the court's view it would be a "manifest injustice" not to do so. Pet. App. 30a.

C. The District Court's Failure To Discharge The Alternate Jurors At The Time Of Jury Deliberations Was Not Plain Error

Although treating the case as one in which respondents failed to preserve their claim in the district court, the court of appeals nonetheless reversed respondents' convictions by holding that the Rule 24(c) violation constituted "plain error." That holding, we submit, reflects a serious misapplication of the plain error rule.

Under Rule 52(b), Federal Rules of Criminal Procedure, an appellate court may take cognizance of "plain errors or defects affecting substantial rights" even in the absence of an objection. The rule is a narrow exception to the contemporaneous objection rule, an exception that "is to be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result." *United States* v. *Frady*,

[4] Every court of appeals has recognized that principle, holding that, except perhaps in the most exceptional circumstances, a defendant should not be able to win reversal of his conviction based on a trial error that he invited. See, *e.g.*, *United States* v. *Muskovsky*, 863 F.2d 1319 (7th Cir. 1988), cert. denied, 489 U.S. 1067 (1989); *People of the Territory of Guam* v. *Alvarez*, 763 F.2d 1036, 1038 (9th Cir. 1985); *United States* v. *Young*, 745 F.2d 733, 752 (2d Cir. 1984), cert. denied, 470 U.S. 1084 (1985); *United States* v. *Mangieri*, 694 F.2d 1270, 1280 (D.C. Cir. 1982); *United States* v. *White*, 377 F.2d 908, 911 (4th Cir.) (a defendant "may not effectively complain that his own trial strategy denied him his constitutional rights"), cert. denied, 389 U.S. 884 (1967).

456 U.S. 152, 163 n.14 (1982). It should be invoked "to correct only 'particularly egregious errors,' those errors that 'seriously affect the fairness, integrity or public reputation of judicial proceedings.'" *United States* v. *Young*, 470 U.S. 1, 15 (1985) (citations omitted). To satisfy that standard, a reviewing court must "find that the claimed error not only seriously affected 'substantial rights,' but that it had an unfair prejudicial impact" on the trial. *Id.* at 17 n.14. The violation of Rule 24(c) in this case did not approach the level of plain error.

Neither the court of appeals nor the respondents were able to point to any specific prejudice that respondents suffered as a result of the alternates' presence in the jury room during deliberations. Instead, the court based its plain error ruling on the conclusion that permitting alternates to retire with the jury is "inherently prejudicial," Pet. App. 28a, and that it requires reversal in every case, regardless of whether any specific prejudice flowed from the error, *id.* at 29a-30a.

The court of appeals' reliance on the "inherent prejudice" rationale to find plain error is wrong in two respects. First, it is contrary to this Court's admonition that "[a] *per se* approach to plain-error review is flawed." *United States* v. *Young*, 470 U.S. at 17 n.14. Second, the error in this case was not, in any event, "inherently prejudicial."

1. As this Court has emphasized, it is not enough to find that an error has been committed; in order for a reviewing court to find plain error, it must find that the error adversely affected the defendant in a substantial way.[5] The reviewing court must find that

[5] Although the language of Rule 52(b) is somewhat opaque on this point, the Court has made clear that an error does not constitute "plain error" simply because it is obvious. It must also result in substantial prejudice to the defendant—enough to give rise to a miscarriage of justice. See *United States* v. *Frady*, 456 U.S. at 163-164 & n.14; *Peretz* v. *United States*, 111 S. Ct. at 2678 (Scalia, J., dissenting).

the error "had an unfair prejudicial impact on the jury's deliberations," which means that the error must have "undermined the fairness of the trial and contributed to a miscarriage of justice." *United States* v. *Young*, 470 U.S. at 17 n.14.

The court of appeals' invocation of the concept of "inherent prejudice" reflects confusion about the distinction between plain error and harmless error, see Fed. R. Crim. P. 52(a). In conducting harmless error analysis, the courts have identified certain errors as "inherently prejudicial" and therefore not subject to being disregarded as harmless even in the absence of a showing of specific prejudice. This Court has included in that category "structural defects in the constitution of the trial mechanism," *Arizona* v. *Fulminante*, 111 S. Ct. 1246, 1265 (1991), as well as other errors whose impact on the trial cannot easily be assessed.[6] The Court's determination that a par-

[6] Those errors include denial of the right to an impartial adjudicator, *Gray* v. *Mississippi*, 481 U.S. 648, 668 (1987) (plurality opinion); trial by a prosecutor with a financial interest in the outcome, *Young* v. *United States ex rel. Vuitton et Fils, S.A.*, 481 U.S. 787, 809-814 (1987) (plurality opinion); denial of the right to conflict-free counsel at trial, *Holloway* v. *Arkansas*, 435 U.S. 475, 491 (1978); denial of the right to self-representation, *McKaskle* v. *Wiggins*, 465 U.S. 168, 177 n.8 (1984); denial of the right to a public trial, *Waller* v. *Georgia*, 467 U.S. 39, 49 & n.9 (1984); denial of the right to have a judge conduct jury selection, *Gomez* v. *United States*, 490 U.S. 858, 876 (1989); and denial of the right not to be forced, without sufficient justification, to take antipsychotic medication during trial, *Riggins* v. *Nevada*, 112 S. Ct. 1810, 1816 (1992).

ticular error can never be harmless within the meaning of Rule 52(a) does not, however, mean that such an error is always "plain" within the meaning of Rule 52(b).

The doctrines of harmless error and plain error protect different interests. The harmless error rule protects rulings in criminal cases from attack on inconsequential grounds. The plain error rule has the dual function of protecting the process of adjudication at trial by requiring the defendant to make his wishes known with respect to a particular ruling, and at the same time protecting against the risk that a defendant will be unjustly convicted because of a serious default on the part of his attorney.

Because of the different policies served by the two doctrines, an error that is non-harmless is not necessarily "plain." An error will be found harmless only if a reviewing court has great confidence that the error did not materially affect the verdict. In order to rise to the level of plain error, however, an error must have a more demonstrable effect on the verdict, since the concern for the fairness of the proceedings must be balanced against the strong policy interests requiring a claim of error to be brought to the attention of the district court in time for the error to be avoided or corrected.[7]

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[7] The courts of appeals that have addressed the relationship between the harmless error and plain error standards have noted that a finding of plain error ordinarily requires a greater showing of prejudice than is necessary to avoid a finding of harmless error. See *United States* v. *McKinney*, 954 F.2d 471, 475-476 (7th Cir. 1992) ("Plain error * * * is an error so grievous that it caused an actual miscarriage of justice, which implies that the defendant probably would not have been convicted absent the error."); *United States* v. *Thame*, 846 F.2d 200, 207 (3d Cir.), cert. denied, 488 U.S. 928 (1988); *United States* v. *Silverstein*, 732 F.2d 1338, 1349 (7th Cir. 1984), cert. denied, 469 U.S. 1111 (1985). That is particularly so with respect to constitutional errors, which cannot be excused under the harmless error doctrine unless the errors are harmless beyond a reasonable doubt.

This Court's cases illustrate the different status of claims of "inherent prejudice" under the harmless error and plain error rules. For example, the Court has held that a denial of the right to a public trial is not subject to harmless error analysis: "the defendant should not be required to prove specific prejudice in order to obtain relief for a violation of the public-trial guarantee." *Waller* v. *Georgia*, 467 U.S. 39, 49 (1984). Yet the Court has held that a defendant who does not object to closure of the proceedings may forfeit his right to a public trial, at least where the showing of specific prejudice is not "sufficiently impressive to render irrelevant failure to make a timely objection." *Levine* v. *United States*, 362 U.S. 610, 619 (1960). The Court in *Levine* noted, in words that are fully applicable to this case, 362 U.S. at 619-620: "Due regard generally for the public nature of the judicial process does not require disregard of the solid demands of the fair administration of justice in favor of a party who, at the appropriate time and acting under advice of counsel, saw no disregard of a right, but raises an abstract claim only as an afterthought on appeal."

Similarly, the Court has held that a claim of racial discrimination in the selection of the grand jury can never be harmless error. See *Vasquez* v. *Hillery*, 474 U.S. 254, 263-264 (1986). Nonetheless, such a claim is forfeited if it is not timely raised in the district court. See *Davis* v. *United States*, 411 U.S. 233 (1973). Although the *Davis* case itself dealt with a

collateral attack on a conviction under 28 U.S.C. 2255, the principle for which it stands is equally applicable to the plain error doctrine. As the Court explained, "[t]he presumption of prejudice which supports the existence of the right is not inconsistent with a holding that actual prejudice must be shown in order to obtain relief from a statutorily provided waiver for failure to assert it in a timely manner." 411 U.S. at 245.

The same principle applies to other rights, such as the right of self-representation. The denial of that right, the Court has held, is per se reversible error; that is, an erroneous denial of the right is not subject to harmless error analysis. *McKaskle* v. *Wiggins*, 465 U.S. 168, 177 n.8 (1984). But there is no requirement that a court invite a defendant to represent himself or even advise him that he has that right, and if the defendant does not timely and unequivocally invoke the right to represent himself, he forfeits it. See *United States* v. *Martinez*, 883 F.2d 750, 757-758 (9th Cir. 1989) (citing cases); *United States* v. *Gillis*, 773 F.2d 549, 559 (4th Cir. 1985); *United States* v. *Weisz*, 718 F.2d 413, 425 (D.C. Cir. 1983), cert. denied, 465 U.S. 1027 (1984); *Brown* v. *Wainwright*, 665 F.2d 607, 610-611 (5th Cir. 1982) (en banc); see generally *McKaskle* v. *Wiggins*, 465 U.S. at 183.

2. Even if "inherent prejudice" were enough to give rise to plain error, it would not help respondents, because the error at issue in this case was not, in any event, "inherently prejudicial." For several reasons, permitting alternate jurors to be present in the jury room during deliberations is simply not the kind of irregularity that should justify reversal in the absence of a substantial showing of specific prejudice to the defendant's right to a fair trial.

First, even assuming that the alternate jurors violated their instructions not to participate in the deliberations, there is as much reason to assume the alternate jurors favored acquittal as there is to think they favored conviction. An error that is at least as likely to benefit as to harm a defendant cannot fairly be regarded as inherently prejudicial. Indeed, in the present context the error was *more* likely to benefit respondents; as this Court has indicated, it is widely supposed that a larger jury favors the defense because the difficulty of achieving a unanimous verdict of guilt beyond a reasonable doubt increases as the number of jurors does. See *Ballew* v. *Georgia*, 435 U.S. 223, 234 (1978) (plurality opinion) ("Statistical studies suggest that the risk of convicting an innocent person * * * rises as the size of the jury diminishes.").

Second, the presence of alternate jurors during deliberations did not violate any constitutional right of respondents. In concluding that the violation of Rule 24(c) amounted to plain error, the court of appeals relied on the Fourth Circuit's decision in *United States* v. *Virginia Erection Corp.*, 335 F.2d 868 (1964), which itself rested on the view that the " 'trial by jury' contemplated by Article III, Section 2, [Cl. 3] and the Sixth Amendment is a trial by a jury of twelve persons, *neither more nor less.*" 335 F.2d at 870. See also *id.* at 871 ("Twelve is the magic number."). That constitutional premise of the Fourth Circuit's decision in *Virginia Erection Corp.*, however, was disapproved in *Williams* v. *Florida*, 399 U.S. 78 (1970). There, the Court rejected the contention that the constitutional guarantee of a trial by jury requires a trial by exactly 12 persons, holding that "the fact that the jury at common law was composed of precisely 12 is a historical accident, unneces-

sary to effect the purposes of the jury system and wholly without significance 'except to mystics.'" *Id.* at 102 (quoting *Duncan* v. *Louisiana*, 391 U.S. 145, 182 (1968) (Harlan, J., dissenting)). This Court has never suggested that the Constitution imposes a limit on the maximum size of juries, and respondents point to no reason that trial by *more* than 12 jurors implicates their constitutional rights.[8]

Third, the court of appeals erred in concluding that the presence of alternate jurors during deliberations is inherently prejudicial because it "infringes upon the jury's privacy and the secrecy of the jury process." Pet. App. 28a (citing *Virginia Erection Corp.*, 335 F.2d at 872). To be sure, if the sanctity of the jury room and the privacy of deliberations is not protected, there is a danger that "[f]reedom of debate might be stifled and independence of thought [might be] checked." *Clark* v. *United States*, 289 U.S. 1, 13 (1933). That danger, however, is not presented by the presence—or even the active participation—of alternate jurors during deliberations.

It is true, of course, that the alternates were not technically members of the jury, because "[o]nce [deliberations] commenced, 'the jury' consisted only

[8] The Court recognized in *Williams* that the number of jurors "should probably be large enough to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility for obtaining a representative cross-section of the community." 399 U.S. at 100. In the wake of *Williams*, the Court focused on the *minimum* number of jurors that could constitutionally be employed. See *Johnson* v. *Louisiana*, 406 U.S. 356 (1972) (9-3 verdict constitutional); *Apodaca* v. *Oregon*, 406 U.S. 404 (1972) (10-2 verdict constitutional); *Burch* v. *Louisiana*, 441 U.S. 130 (1979) (5-1 verdict unconstitutional); *Ballew* v. *Georgia*, 435 U.S. 223 (1978) (5-0 verdict unconstitutional).

of the prescribed number of jurors," *United States* v. *Beasley*, 464 F.2d 468, 469 (10th Cir. 1972). It defies reality, however, to suggest that the presence of the alternate jurors in the jury room during deliberations fundamentally altered the jury's deliberative process. In virtually every respect, alternate jurors are "indistinguishable from regular jurors." *Johnson* v. *Duckworth*, 650 F.2d 122, 125 (7th Cir.), cert. denied, 454 U.S. 867 (1981). They are subject to the same selection process as regular jurors, have the same qualifications, take the same oath, and "have the same functions, powers, facilities and privileges." Fed. R. Crim. P. 24(c). They hear the same evidence, the same arguments of counsel, and the same instructions from the court. Like regular jurors, alternates have been subjected to *voir dire* and determined to be impartial. Accordingly, "the alternate who accompanies the regular jurors into deliberations has no more and no less information about the case than any other juror, and is no more biased or unduly influenced than any other juror." *Johnson* v. *Duckworth*, 650 F.2d at 125.[9]

The distinction between regular jurors and alternates was reduced even further in this case by the procedure used to select the alternates. The alternates were not chosen until the end of the trial, at which time two of the 14 jurors were designated as alternates. Until that time, the jurors did not know

[9] The only conceivable difference between alternates and regular jurors is that alternates are "not committed to the decision that [is] ultimately reached, [and are] not faced with the awful responsibility to decide." *State* v. *Cuzick*, 530 P.2d 288, 289-290 (Wash. 1975). It is hard to imagine, however, that because of that difference the presence of two alternates in the jury room could affect the course and substance of the jury's deliberations.

which of them would be the 12 regular jurors and which would be the two alternates. It is therefore quite unrealistic to treat the alternates, who had in effect served as regular jurors during the three months of the trial, as "strangers" to the jury room whose presence constituted a threat to the sanctity of the jury's deliberations.

The court of appeals thought that the mere presence of alternate jurors during deliberations was inherently prejudicial, in part because their "attitude[s], conveyed by facial expressions, gestures or the like, may have had some effect upon the decision of one or more jurors." Pet. App. 28a. The court of appeals erred in thinking that this potential imposition on the jury process was a basis for finding plain error.

The court of appeals offered no reason to refute the common sense proposition that the "body language" of the alternates could not have had any effect on the deliberations. Any juror who favors acquittal and is resolute enough to resist the facial expressions and gestures of the regular jurors who disagree with him—not to mention their attempts at oral persuasion—would not be swayed in favor of conviction by the expressions or gestures of an alternate. Moreover, the district court specifically instructed the entire jury that the alternates were not to participate in deliberations, making clear that anything said or done by the alternates should not be considered in reaching a verdict. Just as the alternates are presumed to have followed the instruction not to participate, the regular jurors should be presumed not to have allowed themselves to be influenced by any actions of the alternates. It is fanciful to assume that jurors—who the criminal justice system routinely expects to disregard such potentially powerful influences as improper prosecu-

torial comment, improperly admitted evidence, information about other crimes, or the defendant's criminal record—cannot disregard the "body language" of alternate jurors.[10]

The relative insignificance of the Rule 24(c) error at trial is perhaps most pointedly underscored by the fact that defense counsel consented to allowing the alternates to sit in on the deliberations. It is highly unlikely that defense counsel, after observing the jurors for three months and being in the best position to assess any possible effect that retaining the alternates might have on the verdict, would give their considered consent to a procedure that violated their clients' substantial rights to the point of producing a miscarriage of justice. To the contrary, counsel's consent indicates that the defense either favored the procedure employed at trial—perhaps concluding that at least one of the alternates might favor acquittal—or did not regard the matter to be of sufficient moment to warrant an objection. There is no reason to permit respondents to question that choice now.

Not only did the court of appeals overstate the significance of the error in this case, but it failed altogether to take into account the costs exacted by the reversal of a conviction based on a finding of plain error. One of the considerations underlying the courts' reluctance to find plain error absent a

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[10] This Court has applied "in many varying contexts" the "almost invariable presumption of the law that jurors follow their instructions." *Richardson* v. *Marsh*, 481 U.S. 200, 206 (1987) (citing *Francis* v. *Franklin*, 471 U.S. 307, 325 n.9 (1985)). The court of appeals did not dispute that this principle is applicable here, but rather thought that the danger of silent influence was so inherently prejudicial to respondents that it was irrelevant whether the jury disregarded the instruction that the alternates were not to participate in deliberations.

grave risk of injustice is "the societal costs of reversing [the] conviction and requiring a retrial." *United States* v. *Young*, 470 U.S. at 22 n.1 (Brennan, J., concurring in part and dissenting in part). The costs of a reversal in this case are huge: a reversal would effectively nullify the investment of three months of trial time by the court, court personnel, the jury, witnesses, and counsel. It also would make an accurate verdict much less likely, now that more than five years have passed since the trial and more than eight years since the underlying events took place. Besides the burden and expense of a retrial, the problems of fading memories, lost witnesses, and changing government personnel would make a retrial both difficult to conduct and less likely to result in a just disposition of the charges. For that reason as well, the court of appeals should not have reversed respondents' convictions without being confident that the Rule 24(c) violation resulted in particular and substantial prejudice to respondents' right to a fair trial.

D. Respondents' Personal Consent Was Not Necessary For A Valid Forfeiture Of Their Rule 24(c) Claim

In addition to ruling that it was inherently prejudicial to permit the alternates to retire with jury, the court of appeals concluded that the defendants' consent to the procedure through counsel was not sufficient to hold respondents to the consequences of their choice. In order to forfeit their Rule 24(c) claim, the court of appeals held, respondents would have had to give their personal consent to the procedure. Pet. App. 26a. There is no sound basis for that holding.

This Court has recognized that, as a constitutional matter, "the accused has the ultimate authority to make certain fundamental decisions regarding the

case," such as whether to be represented by counsel, whether to plead guilty, and whether to waive a jury. *Jones* v. *Barnes*, 463 U.S. 745, 751 (1983); *Wainwright* v. *Sykes*, 433 U.S. 72, 93 n.1 (1977) (Burger, C.J., concurring). Nonetheless, the constitutional requirement of personal, informed consent by the defendant as a precondition to the effective waiver of trial rights is very much the exception rather than the rule, and the exceptions all involve decisions that have sweeping implications for the litigation.

With respect to most trial rights, the defendant's attorney is authorized to make tactical decisions that can result in the valid forfeiture of those rights without the need to obtain a record recital of the defendant's personal and informed consent. As this Court has explained:

> Although there are basic rights that the attorney cannot waive without the fully informed and publicly acknowledged consent of the client, the lawyer has—and must have—full authority to manage the conduct of the trial. The adversary process could not function effectively if every tactical decision required client approval.

Taylor v. *Illinois*, 484 U.S. 400, 417-418 (1988) (footnote omitted). "Under our adversary system, once a defendant has the assistance of counsel the vast array of trial decisions, strategic and tactical, which must be made before and during trial rests with the accused and his attorney." *Estelle* v. *Williams*, 425 U.S. 501, 512 (1976); see also *Reed* v. *Ross*, 468 U.S. 1, 13 (1984) ("absent exceptional circumstances, a defendant is bound by the tactical decisions of competent counsel"); *Faretta* v. *California*, 422 U.S. 806, 820 (1975) ("when a defendant chooses to have a lawyer manage and present his

case, law and tradition may allocate to the counsel the power to make binding decisions of trial strategy in many areas"). A contrary rule would make trials impossibly cumbersome and lace them with the possibility of reversible error at every turn.

The decision to permit alternate jurors to retire with the regular jurors during deliberations is not the sort of "fundamental" trial decision that the defendant must make personally. Decisions such as whether to be represented by counsel, to plead guilty, or to waive a jury trial profoundly affect the structure of the proceedings; in that respect they are fundamentally different from the decision whether to consent to the presence of alternate jurors in the jury room during deliberations.

There is nothing to distinguish the decision to permit alternate jurors to observe the jury's deliberations from myriad trial decisions that defense counsel make every day without any on-the-record expression of personal consent by the defendant. For example, counsel may decide, as a tactical matter, not to cross-examine a key witness against the defendant, or even to refrain from cross-examining any of the government's witnesses. There is no requirement that the defendant be consulted about that decision, let alone that he personally consent to it on the record. See *Taylor* v. *United States*, 484 U.S. at 418. Similarly, counsel may bind the defendant by deciding not to seek suppression of physical evidence that may be the government's only evidence; there is no requirement that the defendant give an informed, on-the-record consent to that decision. Those choices, like scores of others, may be made—and possible claims on appeal therefore forfeited—without any involvement of the defendant, even though they are likely to have far more impact on the proceedings

than the decision to let alternate jurors silently observe jury deliberations. Indeed, unless a defendant can show plain error or constitutionally ineffective assistance of counsel, a defendant will be held to his lawyer's failure to object even if that failure was inadvertent. See generally *Strickland* v. *Washington*, 466 U.S. 668 (1984).

The court of appeals justified its conclusion by pointing to the interests served by requiring the personal consent of the defendant. Requiring a personal waiver, the court said, "alerts the defendant to the fact that a waiver of Rule 24(c)'s protections may affect the outcome of his case." Pet. App. 26a. We doubt the validity of that proposition. Even if it were correct, however, the same is true of countless other decisions at trial that are undoubtedly subject to waiver by counsel, and the court of appeals offered nothing to distinguish Rule 24(c) from those run of the mine decisions. The court of appeals did not suggest that a right of constitutional dimension was at stake (presumably because none was), and it did not attempt to reconcile its holding with this Court's teaching that only the most fundamental decisions require a personal waiver by the defendant. The court of appeals therefore erred in holding that to allow the alternates to retire with the jury was per se reversible error that could be waived only by the informed, personal consent of each defendant.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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